TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 520

JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO, ET AL., APPELLANTS,

vs.

GOLDEN EAGLE WESTERN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

FILED OCTOBER 16, 1935.

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IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW MEXICO

Be it remembered that on the 25th day of May, 1935, there was filed in the office of the Clerk of the District Court of the United States for the District of New Mexico, in cause number 2765 Equity on the Civil Docket of said Court, wherein Golden Eagle Western Lines, Inc., a corporation, is plaintiff, and James J. Connelly, as Commissioner of Revenue of the State of New Mexico; Juan N. Vigil, as State Comptroller of the State of New Mexico; Frank H. Patton, as Attorney General of the State of New Mexico; Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley as Governor of the State of New Mexico, are defendants, a Bill of Complaint, in words and figures as follows, towit:

BILL OF COMPLAINT—Filed May 25, 1935

To the Honorable District Court of the United States for the District of New Mexico:

Golden Eagle Western Lines, Inc., a corporation of the city of Los Angeles, State of California, files its bill of complaint against the above named defendants and does complain and allege:

I

That the plaintiff, Golden Eagle Western Lines, Inc., is now and at all the times herein mentioned since its organization on or about the 26th day of January, 1935, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, having for its principal place of business the city of Los Angeles, County of Los Angeles, State of California, and is not a citizen or resident of the State of New Mexico, and that its officers, agents and employees are citizens of the United States.

[fol. 4]

II

That at all times herein mentioned, the defendant James J. Connelly is the Commissioner of Revenue of the State of New Mexico; the defendant Juan N. Vigil is the State

Comptroller of the State of New Mexico; the defendant Frank H. Patton is the Attorney General of the State of New Mexico, the defendant Juanita Hill is the State Gasoline Tax Collector of the State of New Mexico, and the defendant Clyde Tingley is the Governor of the State of New Mexico.

III

That each of said defendants named herein is a citizen and resident of the State of New Mexico and of the federal judicial district of New Mexico.

IV

That this suit is a civil suit in equity and the matter in controversy herein exceeds, exclusive of interests and costs, the sum of three thousand dollars as hereinafter more fully appears and arises under the Constitution of the United States, and is between citizens of different states.

V

That during all the times herein mentioned there has been and now is existing in the State of New Mexico a statute of said State known as Chapter 176, Session Laws of 1933, reference to which statute is hereby made and by such reference incorporated herein. It is provided in said statute that violation thereof shall be subject to punishment by a fine of not less than Five Hundred Dollars ($500.00) nor more than One Thousand Dollars ($1,000.00), or imprisonment in the County Jail for a term of not less than thirty days, nor more than one year, or by both such fine and imprisonment and that each day or part thereof during which any person shall engage in the business as a "distributor" without being the holder of an uncancelled license, shall constitute a separate offense within the meaning of [fol. 5] said act. By said act, the word "distributor" is defined so as to include any corporation consuming or using in the State of New Mexico any motor fuel imported into said State from any other state, who shall have purchased or otherwise acquired the same before it shall have been received by any other person in said State. By said statute an excise tax of five cents (5¢) per gallon is levied and imposed upon the use of all gasoline so imported and used in said State. By such statute it is also made unlawful, and

subject to the punishment above stated, for any corporation to use any motor fuel in the State of New Mexico unless such corporation (being a "distributor" as aforesaid) is the holder of an uncancelled license issued by the State Comptroller of said State secured through application and procedure provided by such statute. The said statute further provides that, as a part of the procedure for the securing of said license, the applicant, if a corporation, shall file with its application a certified copy of the certificate of license issued by the New Mexico Corporation Commission, showing that such corporation is authorized to transact such business in said State, and shall also file with said State Comptroller a bond in a sum approved by said Comptroller, and with a surety company authorized by the New Mexico Corporation Commission to transact business in said State as surety, and upon which such "distributor" shall be the principal obligor and the State of New Mexico shall be the obligee, conditioned upon the prompt filing of true reports and payment by such "distributor" to said Comptroller of any and all motor vehicle taxed levied or imposed by said State, together with all penalties and/or interest thereon and all fines which may be levied for any violations of said statute, and generally conditioned upon faithful compliance with the provisions of said statute, the total amount of such bond to be fixed by said Comptroller but to be not less than Three Thousand Dollars ($3,000.00) nor more than Fifty Thousand Dollars ($50,000.00). Said [fol. 6] statute further requires upon the filing of said application for license by such "distributor" the payment of a license fee by such "distributor" to said Comptroller in the sum of Twenty-Five Dollars ($25.00) for each distribution station or place of business or agency of the "distributor". Said statute further provides that such "distributor" shall monthly file a report with the State Comptroller, showing the details as specified in such statute, including the total number of gallons of motor fuel used in said State during the preceding month by such "distributor" and accompanying said report by remittance of the amount of excise taxes provided by said statute upon gasoline so used by said "distributor". Said statute further provides that as a penalty for the non-payment of the tax at the time and in the manner by such statute provided, there shall be added thereto five per cent (5%)

thereof, together with interest at the rate of one per cent (1%) per month until paid and further that, if attorneys are employed to collect such delinquent tax, ten per cent (10%) of the taxes, penalty and interest shall be added thereto as part of the cost of collection and paid by said "distributor" to said attorney or attorneys. Said statute further provides that upon failure of such "distributor" to file the required monthly reports of gallons of gasoline used, the State Comptroller shall determine from any information obtainable the number of gallons of motor vehicle fuel with respect to which the "distributor" has incurred liability under the Motor Vehicle Fuel Tax Laws of said State and compute the taxes, penalties and interest thereon and that, in any action or proceeding for the collection of such taxes, interest or penalties, such assessment by the State Comptroller shall constitute prima facie evidence of the claim of the State, and the burden of proof shall be upon the "distributor" to show that the assessment was incorrect and contrary to law. Said statute further provides that, should the "distributor" neglect or refuse to pay the said tax, the amount thereof with interest, penal- [fol. 7] ties and other additions thereto shall be a lien in favor of the State upon all franchises, property and rights to property, whether real or personal, then belonging to or thereafter acquired by such "distributor", said statute further providing the details as to the application, enforcement and effect of said lien. Said statute further provides that if any "distributor" shall be in default for more than ten days in the payment of any said taxes, interest and penalties, the State Comptroller may issue a warrant under the official seal of his office directed to the sheriff of any County in the State, commanding said sheriff to levy upon and sell the goods and chattels of such "distributor", without exemption, found within his jurisdiction for the payment of the amount of said delinquency, further providing the details of such procedure. Said statute further provides that whenever such "distributor" ceases to engage in business as such within said State, including discontinuance by sale or transfer, it shall be the duty of such "distributor" to notify the State Comptroller in writing at least ten (10) days prior to the time the discontinuance, sale or transfer takes effect, said statute giving the details concerning such notice, and that all said taxes, penalties and interest shall become due and payable concurrently with such

discontinuance, sale or transfer, and that the same shall then be reported and paid; and further provides that, unless the said notice shall have been so given, the purchaser or transferee shall be liable to said State for the amount of all taxes, penalties and interest to the extent of the value of the property and business to be acquired by such "distributor". Such statute contains many other additional provisions applicable to the facts hereinafter stated and effecting plaintiff's cause of action as herein set forth.

VI

Plaintiff is engaged exclusively in the business of operating, as a common carrier, motor propelled vehicles for [fol. 8] the transportation of persons and property between fixed termini and over regular routes, for compensation, over the public highways of various states, including the public highways of the State of New Mexico, said business being exclusively and entirely limited to interstate commerce, and, as relates to the matters herein stated, to the business of such interstate common carrier transportation of persons and property between the cities of Los Angeles, California, and El Paso, Texas, which routes include public highways of the State of New Mexico. Neither the plaintiff nor its predecessors in interest have heretofore engaged in any intrastate commerce within the State of New Mexico, nor is plaintiff now so engaged, nor does plaintiff desire to engage therein, nor in any manner offer service in, make investments for, or submit to regulations exclusively applying to, or to taxation or other local burdens exclusively applying to intrastate commerce; nor has the plaintiff or its predecessors in interest at any time sold or offered for sale, nor does it intend to sell, within the State of New Mexico any gasoline whatsoever, or in any other manner deal with gasoline, its manufacture, sale, transportation or distribution except to use the same as motor fuel in the manner and to the extent hereinafter stated.

VII

That the motor vehicles so operated by plaintiff and its predecessors in interest are propelled by internal combustion motors wherein gasoline is used as a fuel; that said fuel is entirely purchased at retail and is placed in its tanks built in and contained in said motor vehicles in the ordi-

nary and customary manner provided for the carrying and using of the gasoline for developing said motive power; that at none of the times herein mentioned did plaintiff store any gasoline at any place within the State of New Mexico or withdraw the same for use within the State of New Mexico except for regular licensed distributors maintaining service stations for distribution of such gasoline [fol. 9] along said highway route; that of necessity in the conduct of said interstate commerce such motor fuel is purchased and placed in the tanks of the vehicles in other states than the State of New Mexico and in which such taxes on said gasoline as may be provided or required by such respective states, is paid at the time of purchase thereof, and in the course of the conduct of said interstate commerce in the manner aforesaid there is transported into and through New Mexico the gasoline so placed in said tanks that is being used to propel said vehicles; that said interstate commerce is conducted on through trips made by said vehicles, the operation being continuous through the entire State of New Mexico except for the necessary stops for the convenience of said interstate passengers.

VIII

That on or about the 30th day of April, 1935, the said defendants acting through the Gasoline Tax Department, Bureau of Revenue of said State of New Mexico, made written demand upon this plaintiff for compliance with said statute hereinbefore referred to, a copy of said demand being hereto annexed and marked "Exhibit A." By such written demand, said defendants have applied said statute to this plaintiff as a carrier in interstate commerce and to the use of its facilities in interstate commerce, demanding that this plaintiff make application for a license as "distributor" and pay the license fee with penalties and interest as required by said Chapter 176 of said Session Laws of 1933; further notifying plaintiff that it is deemed by said defendants to be a "distributor" within the meaning of said statute and that it was and is unlawful for such "distributor" to use motor fuel unless such "distributor" is the holder of an uncancelled license; said defendants thereby further demanded that this plaintiff furnish surety to the State of [fol. 10] New Mexico in the amount of Six Thousand Dollars ($6,000.00) for the purposes in said statute provided;

said defendants further thereby notified this plaintiff of an arbitrary assessment of excise taxes covering the gasoline used in operating in such interstate commerce by plaintiff and its predecessors in interest, covering a period from April, 1932, to April, 1935, which, with penalties and interest, constituted a total demand against plaintiff, by reason of the application of said statute, in the sum of Seven Thousand Eighty Dollars and Forty-nine Cents ($7,080.49), and making said demand that payment thereof be made by plaintiff by return mail.

IX

That the plaintiff and its predecessors in interest have in all respects complied with such statute in relation to all gasoline or motor fuel purchased, acquired or withdrawn from storage within the State of New Mexico and that the said claim against the said plaintiff so made as aforesaid for excise taxes relates to gasoline alleged to have been purchased and placed in the fuel tanks of the respective vehicles in other states than the State of New Mexico.

X

That the plaintiff and its predecessors in interest have since said date of April, 1932, been conducting said operation in interstate commerce and are still conducting the same; that, although the operation of this plaintiff, as conducted by it, extends only between the cities of Los Angeles, California, and El Paso, Texas, the same is conducted in connection with other interstate bus operations east of El Paso, Texas, serving all parts of the United States and that the interstate business therefore of this plaintiff includes the transportation of such interstate passengers through the State of New Mexico who are arriving from and destined to fully fifty per cent (50%) of the [fol. 11] States of the Union; that at least one schedule is operated in each direction daily; that the operative rights, permits, certificates of public convenience and necessity, and franchises now owned by the plaintiff constitute a large portion of the actual property value of said business amounting to an excess of Three Thousand Dollars ($3,000.00); that, in the conduct of such interstate commerce, it is absolutely necessary to traverse the highways of the State of New Mexico and if, due to the application of said

statute, defendants should cause a lien to be placed on said operative rights in the State of New Mexico and foreclosed or should otherwise prohibit plaintiff from operating its vehicles of interstate commerce over the highways of the State of New Mexico, the entire value of all of the properties, operative rights, permits and franchises of the plaintiff would be lost; that due to the nature of the operative rights and laws of the various jurisdictions, state and national, applying thereto, the discontinuance of operation, even though temporary, would be liable to cause the loss and forfeiture of all of said operative rights as well as the complete loss of the good will of said operation which alone has a value in excess of Three Thousand Dollars ($3,000.00).

XI

That in the conduct of such interstate commerce by plaintiff, plaintiff is required to employ drivers, agents and other representatives to actually conduct said business and to place in charge of its said motor vehicles, employees whose duty it is to use the gasoline that is provided by the company as aforesaid in propelling its vehicles; that the defendants threaten to enforce said statute against plaintiff and its said employees and to cause their arrest, as well as to compel the payment of the said licenses, taxes, fines, penalties, interests and costs as hereinbefore alleged, each and every of which threatened acts will cause this plaintiff great and irreparable injury; that each day that plaintiff is prohibited from operating its said business and [fol. 12] interstate commerce through the State of New Mexico it will suffer material and irreparable loss thereby, to-wit in excess of two hundred dollars per day due to loss of patronage.

XII

That because of the provisions of said statute whereby each day or part thereof during which this plaintiff as an alleged "distributor" shall, as such law is sought to be applied by said defendants, use gasoline in the State of New Mexico without being the holder of an uncancelled license, constitutes a separate criminal offense, plaintiff is compelled against its will to either forthwith submit to the unlawful license and excise tax provisions of such statute

or incur the liability for excessive penalties because of alleged daily infraction of said statute.

XIII

That the said defendants and each of them threaten to and will, unless restrained by an order of this Court, cause the immediate arrest of the officers and employees of plaintiff on each occasion that plaintiff may operate its interstate business aforesaid in the State of New Mexico and will cause liens to be filed against the franchises and property and rights of this plaintiff and will cause the sale thereof and that plaintiff and its employees will also be arrested by and through the action of defendants in the enforcement of said statute for alleged past offenses under said statute, to-wit: daily use of motor fuel in the State of New Mexico without being a licensed "distributor", failure to file monthly reports since April, 1932, as to gasoline so used; failure to make payments of excise taxes, penalties and interest and for many other possible alleged offenses defined in such statute but not lawfully applicable in any manner or at all to this plaintiff in its conduct of interstate commerce and in its purchase of gasoline in other states and using the same from its motor vehicle tanks while tra- [fol. 13] versing the highways of the State of New Mexico.

If defendants do as threatened, plaintiff will suffer irreparable injury and will be subject to a multiplicity of suits, will be subjected to heavy and severe penalties, be required to furnish many heavy bail bonds, and be compelled in the protection of its business from entire loss to comply with such statute if financially able to do so, regardless of its legality, or the merits of defense; that plaintiff is not financially able to pay the demands so placed upon it for taxes, licenses, interest and penalties and that, therefore, if defendants do as threatened, the interstate business of plaintiff will be unduly burdened and destroyed, all of which will cause plaintiff great and irreparable injury, and will absolutely prohibit plaintiff from engaging in interstate commerce.

XIV

That the specific undue and unlawful burdens on interstate commerce so imposed by such statute and the application of said statute by defendants and which plaintiff claims

are in direct contravention with the provisions of the Constitution of the United States hereinafter referred to, include the following:

That said statute imposes as a condition for a foreign corporation engaging in interstate commerce the qualification under state law to engage in a separate and distinct form of intrastate commerce.

By legislative declaration, it compels an interstate carrier against its will to become a "distributor" of gasoline subject to state license and regulation.

Said statute imposes a privilege tax of five cents (5¢) per gallon on the right to use gasoline as a facility of interstate commerce.

Said statute requires as a condition for a foreign corporation engaged in interstate commerce receiving said license, the domestication of such foreign corporation within the State of New Mexico, with the consequent burdens of [fol. 14] expenditures by such foreign corporation in payment of fees and costs thereof, designation of statutory agent and filing of corporation statements and declarations over which said State has no lawful jurisdiction as to a purely interstate carrier.

Said statute requires the filing by such interstate carrier of large and excessive bonds conditioned upon compliance by an interstate carrier with numerous state statutory requirements that are each an undue burden on interstate commerce, unlawful and void.

Said statute requires the payment of license fees as a privilege for using facilities in interstate commerce and without the payment of which interstate commerce may not lawfully be engaged in within the terms of said statute.

Said statute requires payment of said license fee, not only as to the interstate carrier for the privilege of engaging in interstate commerce but a separate license fee for each place of business or agency that such interstate carrier may maintain within said State.

Said statute requires the filing of a bond by an interstate carrier among the conditions of which are not only the payment of taxes, penalties and interest imposed by said statute, but also the payment of fines in criminal cases not yet instituted.

That in requiring the bond for the payment of fines imposed by said statute, the statute directly connects the penal

sections of said statute and the compliance therewith by interstate carriers with the conditions of the civil sections of said statute that impose conditions precedent upon the interstate carrier in his exercise of his rights to engage in interstate commerce.

Said statute imposes upon the interstate carrier requirement of filing of monthly reports of gasoline used by the interstate carrier as a facility in its interstate commerce and the paying of an excise tax thereon, regardless of the [fol. 15] place of purchase, storage, or withdrawal or the situs of such gasoline within or without said State, or its use or transportation by such interstate carrier in interstate commerce.

Said statute requires a carrier engaged solely in interstate commerce to make monthly reports to said State concerning the use of its interstate facilities, not for police or regulatory requirements, but solely for the purpose of assessment and collection of excise taxes on the privilege of engaging in interstate commerce and using the facilities thereof.

Said statute provides diverse and severe penalties and interest for the non-payment of said unlawful excise taxes by said interstate carrier.

That said statute imposes upon such interstate carrier the further requirements to pay large sums of money as attorney fees in addition to said taxes, interest and penalties if said State shall employ attorneys to collect such tax.

Said statute vests complete jurisdiction in the State Comptroller of the State of New Mexico to authorize or withdraw authorization to use gasoline as an instrumentality of interstate commerce within the State of New Mexico.

Said statute allows said State Comptroller to make arbitrary assessments of such excise taxes if the user of gasoline as a facility in interstate commerce shall fail to make a report of the amount so used.

Said statute makes such excise taxes, interest, penalties and other additions to such taxes a lien in favor of the State upon all franchises, property and rights of the interstate carrier and authorizes the State to sell such franchises, property and rights of the interstate carrier in the satisfaction of such lien.

Said statute authorizes, without any process of law whatsoever, the State Comptroller to issue a warrant directed to

a County Sheriff to levy upon and sell the property of such user of gasoline in interstate commerce without exemption, [fol. 16] in payment of such excise taxes, interest, penalties, and by said statute, such warrant so issued without any judicial procedure whatsoever, is given the effect of an execution issued out of the District Court of the State of New Mexico.

Said statute further imposes such lien for excise taxes, interest and penalties upon the property of the successor in interest of the user of such gasoline as a facility of interstate commerce.

Said statute requires such user of gasoline as a facility in interstate commerce to maintain for two years records of gasoline used, as well as other records that may be required by the State Comptroller, not for purpose of police regulation but solely for the purpose of facilitating the administration of the said unlawful license and privilege taxes on the use of facilities in interstate commerce.

Said statute requires the user of gasoline as a facility in interstate commerce who purchases gasoline outside of the State of New Mexico to carry a manifest prescribed by the said State Comptroller relating to the gasoline so used, with various conditions and requirements concerning such manifest.

Said statute provides severe fines and imprisonment for violation thereof in any particular including those particulars hereinbefore mentioned, especially providing that each day or part thereof during which any person or corporation, including an interstate carrier using gasoline as a facility in interstate commerce, defined as a "distributor", shall engage in business as such "distributor" without holding an uncancelled "distributor" license, shall constitute a separate offense.

XV

That for the reasons aforesaid, plaintiff has no plain, speedy, adequate or complete remedy at law; plaintiff is definitely deprived of its constitutional right to engage in interstate commerce without submitting to the said unlawful rules, regulations and license and tax requirements of [fol. 17] said State of New Mexico, all of which constitute an undue burden on interstate commerce.

XVI

That by reason of said acts and threatened acts on the part of defendants, unless the injunction herein prayed for do forthwith issue, plaintiff will be forthwith and continuously unlawfully deprived of his constitutional rights, to-wit:

(1) The right to engage in interstate commerce without the same being unduly burdened by the action of the State of New Mexico and these defendants as officers thereof, as guaranteed by Art. I, Section 8, Clause 3, of the Constitution of the United States.

(2) The right to not be deprived of liberty and property without due process of law as guaranteed by Amendment V to the Constitution of the United States.

(3) The right to not be subjected to the imposition of excessive fines, to cruel and unusual punishment, and to not be required to furnish excessive bail, as guaranteed by Amendment VIII to the Constitution of the United States.

(4) The right to be free from the imposition or enforcement by the State of New Mexico, or by these defendants, as officers thereof, of any law of said State of New Mexico, abridging the privileges and immunities of citizens of the United States, or of this plaintiff, or depriving said plaintiff or its employees of liberty or property without due process of law, or denying to plaintiff the equal protection of the laws, as guaranteed by Amendment XIV to the Constitution of the United States.

Wherefore plaintiff prays for a decree of this Court as follows:

(1) That a writ of interlocutory injunction issue from this Court under seal thereof directed to the said defendants and each of them, restraining and enjoining said defendants and each of them and/or their successors in office, and all per- [fol. 18] sons acting in aid of said defendants or either of them, or their successors in office, from arresting or causing or authorizing the arrest of plaintiff, or its agents or employees, or otherwise preventing or interfering with plaintiff in its conduct of its operation of buses as a common carrier of passengers and property for compensation over

the public highways of the State of New Mexico in interstate commerce, because of any alleged noncompliance with Chapter 176 of the Session Laws of 1933 of the State of New Mexico (including amendments thereto) so far as relates to gasoline or other motor fuel purchased by plaintiff or its predecessors in interest, or to be purchased by plaintiff, within other states than the State of New Mexico, and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico; or from enforcing said Statute in any other manner against this plaintiff or its predecessors in interest by reason of the use of gasoline or other motor fuel within the State of New Mexico that shall have been or shall be acquired and used as aforesaid, until final termination of this cause or until the further order of this Court.

(2) That a temporary Restraining Order or Injunction issue forthwith restraining and enjoining said defendants and each of them and/or their successors in office, and all persons acting in aid of said defendants or either of them, or their successors in office, in the same manner and to the same extent as is herein set forth in Paragraph (1) of this prayer, until the interlocutory injunction herein prayed for shall issue.

(3) That on hearing hereof it be adjudged and decreed by this Court that said statute of the State of New Mexico is unconstitutional, null and void in its aforesaid application to this plaintiff and the gasoline or other motor fuel purchased or acquired by plaintiff or its predecessors in interest outside of the State of New Mexico and at such place of purchase or acquisition placed within its vehicles [fol. 19] for use in its conduct of its business of interstate commerce, though used within the State of New Mexico in the conduct of such interstate commerce, and that said interlocutory injunction be made permanent, subject to such orders, reservations and restrictions as the Court may deem proper.

(4) That plaintiff have such other, further and different relief as to the Court may seem meet and equitable in the premises.

And plaintiff will ever pray.

Golden Eagle Western Lines, Inc., by D. Grant, President. E. R. Wright, Santa Fe, New Mexico, Attorney for Plaintiff. Earl A. Bagby, Attorney for Plaintiff, No. 560 South Los Angeles St., Los Angeles, California.

Duly sworn to by D. Grant. Jurat omitted in printing.

[fol. 20] EXHIBIT "A" TO BILL OF COMPLAINT

State of New Mexico,

Bureau of Revenue,

Gasoline Tax Department

Santa Fe, New Mexico, April 30, 1935.

Golden Eagle Western Lines, Inc., and/or Golden Eagle Bus Lines, 1268 S. Alvarado St., Los Angeles, Calif.

GENTLEMEN:

We attach hereto for your convenience our form Application for License for Distributor of Motor Fuel, which you will kindly fill out and return to this office, together with the license fee of $25.00, penalty $1.25 and interest to date $1.25, as required by Chapter 176 of the Session Laws of 1933, under sub-section 2, paragraph C, of Section 1, defining a distributor of motor fuel within the State of New Mexico, which sub-section I am quoting as follows:

"consuming or using in the State of New Mexico any motor fuel so imported, who shall have purchased or otherwise acquired the same before it shall have been received by any other person in this state within the meaning of this act."

Under Section 3 of this act, "it shall be unlawful for any distributor to import, receive, *use*, sell or distribute any motor fuel * * * unless such distributor or retail dealer is the holder of an uncancelled license."

Under Section 4 of this act, it will be necessary that you place surety bond with the State of New Mexico in the amount of $6000.00.

[fols. 21-25] We are unable to find where your firm has made any return to this department for the 5¢ per gallon excise tax as covered in Section 2 of this act. We are therefore requesting payment in the amount of $5,792.45 excise tax covering the gasoline used in operating your motor coaches over the highways of this state from April 1932 to date. This assessment is based on the mileage covered as reported by you to the State Corporation Commission, using the basis of 3 miles per gallon on which to assess the tax.

Under Section 5 of this act it becomes necessary that each distributor make return not later than the 25th day of each calendar month of the amount of tax due from the same. Because this was not done, it is necessary that we add to the amount of tax a five (5) per cent penalty and one (1) per cent interest per month, the total amount of penalty being $289.69 and the total amount of interest being $998.35, making a total due from you of $7080.49.

This penalty and interest is covered by Section 8.

We are attaching hereto schedule on which we base our assessments and for your convenience a copy of the law which is quoted above.

We will expect remittance by return mail.

Very truly yours, (Sgd.) S. W. Burr, Special Auditor-Collector.

SWB:D. encl.

[fol. 26] IN UNITED STATES DISTRICT COURT

ANSWER OF JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO; JUAN N. VIGIL, AS STATE COMPTROLLER OF THE STATE OF NEW MEXICO; FRANK H. PATTON, AS ATTORNEY GENERAL OF THE STATE OF NEW MEXICO; JUANITA HILL, AS STATE GASOLINE TAX COLLECTOR OF THE STATE OF NEW MEXICO, AND CLYDE TINGLEY AS GOVERNOR OF THE STATE OF NEW MEXICO—Filed June 8, 1935.

Come now the above named defendants, John D. Bingaman, Juan N. Vigil, Frank H. Patton, Juanita Hill and Clyde Tingley in their respective official capacities as hereinabove set forth and answer the Bill of Complaint filed [fol. 27] in this cause and say for answer thereto:

1. Defendants admit the allegations set forth in Paragraph I of the Bill of Complaint filed herein.

2. The defendants admit the allegations of Paragraph II of the said Bill of Complaint, except as to the allegation therein contained stating that James J. Connelly is the Commissioner of Revenue of the State of New Mexico and allege the fact as to said allegation to be that at the time of the filing of the said Bill of Complaint the said James J. Connelly was Commissioner of Revenue of the State of New Mexico but that subsequent to the filing of said Bill of Complaint and the service thereof upon the defendants in said cause, the defendant, John D. Bingaman, was appointed as Commissioner of Revenue of the State of New Mexico in the place of James J. Connelly; that on the — day of May, 1935, plaintiff filed in this cause a motion to substitute the said John D. Bingaman as the defendant in the place of James J. Connelly and that this Court entered an order on the — day of May, 1935, substituting the said John D. Bingaman as Commissioner of Revenue of the State of New Mexico for the said James J. Connelly.

3. The defendants admit the allegations set forth in Paragraph III of said Bill of Complaint.

4. The defendants admit the allegations set forth in Paragraph IV of said Bill of Complaint.

5. In answer to Paragraph V of said Bill of Complaint, defendants deny that at all times mentioned in said Bill of Complaint there has been in the State of New Mexico a statute of the said State known as Chapter 176, Session Laws of 1933, and state the fact to be that the said statute, Chapter 176 of the Session Laws of 1933, became effective on the 12th day of June, 1933, and has been effective subsequent to that time during all of the times mentioned in said Bill of Complaint; that prior to the effective date of [fol. 28] Chapter 176 of the Session Laws of 1933, there was in force and effect in the State of New Mexico a statute of said State known as Chapter 29 of the Session Laws of 1929, which was in effect in said State from March 7, 1929, to June 12, 1933; that said Chapter 29 of the Laws of 1929 purported to levy an excise tax of five cents (5¢) per gallon upon the use of all gasoline and motor fuel used in this State for any purpose. A portion of the tax which defendants are attempting to collect from plaintiff is by virtue

of the said Chapter 29 of the Laws of 1929. Defendants admit the other allegations set forth in said Paragraph V of the Bill of Complaint, relative to the provisions of Chapter 176 of the Laws of 1933, but allege that the provisions of said statute are applicable to all persons, firms and corporations using, selling and distributing gasoline within the State of New Mexico, and are not confined particularly to corporations, or any certain class of corporations, as indicated by the allegations of the Bill of Complaint.

6. Answering the allegations set forth in Paragraph VI of the Bill of Complaint, defendants admit that plaintiff is engaged exclusively in the business of operating as a common carrier, motor propelled vehicles for the transportation of persons and property between fixed termini and over regular routes for compensation over the public highways of various states, including the public highways of the State of New Mexico, and that their business is exclusively and entirely limited to interstate commerce and, as relates to the matters stated in said Bill of Complaint, to the business of such interstate common carrier transportation of persons and property between the cities of Los Angeles, California, and El Paso, Texas, which routes include public highways of the State of New Mexico. Defendants do not have sufficient knowledge or information to answer the allegations to the effect that neither the plaintiff nor its predecessors in interest have heretofore engaged in any intrastate commerce within the State of New Mexico but state that in so far as the claim for the [fol. 29] taxes due the State of New Mexico by plaintiff as set forth in the Bill of Complaint, defendants do not rely upon plaintiff conducting any intrastate business in order to enforce the payment of said taxes and admit that in so far as plaintiff's operations through the State of New Mexico are concerned in the matters involved in this suit, that plaintiff is solely an interstate common carrier. Defendants do not have sufficient knowledge or information to answer the allegation in the Bill of Complaint to the effect that plaintiff does not desire to engage in intrastate business nor to offer services in making investments for or submit to regulations exclusively applying to, or to taxation or other local burdens exclusively applying to intrastate commerce, and therefore deny such allegations on information and belief. Defendants admit that plaintiff

and its predecessors in interest have not, during the times involved in this suit, sold or offered for sale within the State of New Mexico any gasoline, but defendants do not have any knowledge or information sufficient to answer the allegation that plaintiff does not intend to sell or in any other matter deal with gasoline within the State of New Mexico, and therefore deny such allegation on information and belief.

7. Defendants admit that the motor vehicles so operated by plaintiff and its predecessors in interest are propelled by internal combustion motors wherein gasoline is used as a fuel, and that said fuel is entirely purchased at retail and is placed in its tanks, built and contained in said motor vehicles, in the ordinary and customary manner provided for carrying and using of the gasoline for developing said motive power. Defendants further admit that at none of the times herein mentioned did plaintiff store any gasoline at any place within the State of New Mexico or withdraw the same for use within the State of New Mexico except as the same was stored into tanks upon the motor busses used in its interstate business and withdrawn from the said tanks directly into the internal combustion engines propelling said vehicles. Defendants [fol. 30] deny the allegation to the effect that of necessity in the conduct of said interstate commerce such motor fuel is purchased and placed in the tanks of the vehicles in other states than the State of New Mexico, and in which such taxes on said gasoline as may be provided or required by such respective states is paid at the times of purchase thereof and state the facts to be that plaintiff purchases practically all, if not all, of its gasoline used to propel its motor busses outside of the State of New Mexico, although the gasoline is for sale and may be bought within the State of New Mexico along the route of plaintiff's busses just as well as it can be purchased outside of the State of New Mexico. Defendants further allege that all of the gasoline used by plaintiff for its busses on its westbound trips through the State of New Mexico is purchased by plaintiff at La Tuna, Texas, which town of La Tuna is situated on the boundary line between Texas and New Mexico, and that although plaintiff pays the gasoline tax required to be paid by the State of Texas on the gasoline so purchased, it has, since the 6th day of January, 1934, and does now,

obtain a refund of all of the state tax paid to the State of Texas on the gasoline so purchased for the reason that plaintiff is using said gasoline outside of the State of Texas. Defendants admit the allegation that in the course or conduct of said interstate commerce in the manner set forth in the Bill of Complaint, there is transported into and through New Mexico the gasoline so place- in said tanks that is being used to propel said vehicles; and that said interstate commerce is conducted on through-trips made by said vehicles, the operation being continuous through the entire State of New Mexico except for the necessary stops for the convenience of said interstate passengers.

8. Defendants admit the allegations set forth in Paragraph VIII of said Bill of Complaint.

9. Defendants do not have sufficient information or knowledge to answer the allegation to the effect that plain- [fol. 31] tiff and its predecessors in interest have in all respects complied with such statute in relation to all gasoline or motor fuel purchased, acquired or withdrawn from storage within the State of New Mexico, and therefore deny the same on information and belief. Defendants admit, however, that the said claim against said plaintiff so made as set forth in the Bill of Complaint for excise taxes relates to the gasoline alleged to have been purchased and placed in the fuel tanks of the respective vehicles in other states than the State of New Mexico.

10. Defendants admit the allegations to the effect that plaintiff and its predecessors in interest have since the date of April, 1932, been conducting said operation in interstate commerce and are still conducting it. Defendants do not have sufficient knowledge or information to answer the allegation in said Paragraph X of the Bill of Complaint to the effect that although the operation of this plaintiff, as conducted by it, extends only between the cities of Los Angeles, California, and El Paso, Texas, the same is conducted in connection with the other interstate bus operations east of El Paso, Texas, serving all parts of the United States and that the interstate business, therefore, of the plaintiff includes the transportation of such interstate passengers through the State of New Mexico who are arriving from and destined to fully fifty per cent (50%) of the states of the Union, and therefore deny the same on infor-

mation and belief. Defendants admit that at least one schedule is operated across the State of New Mexico in each direction daily. Defendants do not have sufficient knowledge or information to answer the allegation in Paragraph X of said Bill of Complaint to the effect that the operative rights, permits, Certificates of Public Conveyance and Necessity and franchises now owned by plaintiff constitute a large portion of the actual property value of said business amounting to an excess of Three Thousand Dollars ($3,000.00) and that in the conduct of such interstate commerce, it is absolutely necessary to traverse the highways of the [fol. 32] State of New Mexico and due to the application of said statute defendants cause a lien to be placed on said operative rights in the State of New Mexico and foreclosed, or should otherwise prohibit plaintiff from operating its vehicles of interstate commerce over the highways of the State of New Mexico, the entire value of all the properties, operative rights, permits and franchises of the plaintiff would be lost and that due to the nature of the operative rights and loss of the various jurisdictions, state and national, applying thereto, the discontinuance of operation, even though temporary, would be liable to cause the loss and forfeiture of all of said operative rights as well as the complete loss of the good will of said operation which alone has a value in excess of Three Thousand Dollars ($3,000.00) and defendants therefore deny said allegations on information and belief.

11. Answering Paragraph XI of said Bill of Complaint defendants admit that they threaten and intend to enforce said statutes against plaintiff and its said employees and to compel the payment of said licenses, taxes, fines, penalties, interest and costs as set forth in said Bill of Complaint. Defendants state that they do not have sufficient knowledge or information to answer the allegations in said Paragraph XI of the Bill of Complaint to the effect that the threatened acts of defendants will cause plaintiff great and irreparable injury and that each day plaintiff is prohibited from operating its said business and interstate commerce through the State of New Mexico, it will suffer material and irreparable loss thereby, to-wit, in excess of Two Hundred Dollars ($200.00) per day due to loss of patronage, and therefore deny the same on information and belief.

12. Defendants admit the allegations set forth in Paragraph XII of the bill of Complaint except that they deny that the license and excise tax provided by the New Mexico statutes hereinabove referred to are unlawful and further [fol. 33] deny that the penalties provided by said statutes on account of a violation thereof are excessive.

13. Defendants admit that they intend to enforce the provisions of the said New Mexico statutes referred to with respect to plaintiff and its employees for the failure of plaintiff to comply with the provisions of the said New Mexico statutes as set forth in the Bill of Complaint, but defendants deny that the said statutes imposing an excise tax on the plaintiff for the use of the highways of New Mexico, measured by the number of gallons of gasoline so used, and requiring plaintiff to be licensed as a distributor in accordance with the terms thereof, and providing for penalties and interest for a violation of the terms of said statute are not lawfully applicable to this plaintiff. Defendants deny that if defendants do as threatened, plaintiff will suffer irreparable injury and will be subject to a multiplicity of suits, will be subjected to heavy and severe penalties, be required to furnish many heavy bail bonds and be compelled in the protection of its business from entire loss to comply with such statute if financially able to do so regardless of its legality or the merits of defense; that plaintiff is not financially able to pay the demand so placed upon it for taxes, licenses, interest and penalties and that, therefore, if defendants do as threatened the interstate business of plaintiff will be unduly burdened and destroyed, all of which will cause plaintiff great and irreparable injury and will absolutely prohibit plaintiff from engaging in interstate commerce.

14. Answering Paragraph XIV of the Bill of Complaint defendants deny that the statute or statutes in question impose any undue and unlawful burdens on interstate commerce and deny that said statute or statutes are in any way in contravention with the provisions of the Constitution of the United States.

Defendants deny that the said statute or statutes impose [fol. 34] as a condition for a foreign corporation engaging in interstate commerce, the qualifications under state law to engage in a separate and distinct form of intrastate commerce.

Defendants admit that by the terms of the said statutes any person, firm or corporation using gasoline in the State of New Mexico where there has been no prior sale within the State is, under the definitions of said statute, designated a "distributor" of gasoline, but further state that the designation of such person as a "distributor" is only a means of insuring the collection of the gasoline tax due to the state by the terms of said law and does not impose any undue burden on interstate commerce.

Defendants deny that the said statute or statutes impose a privilege tax of five cents (5¢) per gallon on the right to use gasoline as a facility of interstate commerce but state the fact to be that the said statutes, which construed in connection with Chapter 31 of the Laws of 1931, impose a tax upon the privilege of using the public highways of the State of New Mexico, which tax is measured by the number of gallons of gasoline used on said public highways.

Defendants deny that said statute or statutes require as a condition for a foreign corporation engaged in interstate commerce receiving said licenses, the domestication of such foreign corporation within the State of New Mexico with the consequent burdens of expenditures by such foreign corporation in payment of fees and costs thereof, designation of a statutory agent and filing of corporation statements and declarations over which said State has no lawful jurisdiction as to a purely interstate carrier.

Defendants deny that said statute requires the filing by such interstate carrier of large and excessive bonds conditioned upon compliance by an interstate carrier with numerous state statutory requirements that are each an undue burden on interstate commerce unlawful and void, [fol. 35] but state the fact to be that the bond required to be filed by the said statute is reasonable and that all other requirements of the statute are reasonable and lawful and are only for the purpose of insuring the collection by the state of tax lawfully due it.

Defendants deny that said statute or statutes require the payment of license fees as a privilege for using facilities in interstate commerce and without the payment of which interstate commerce may not lawfully be engaged in within the terms of said statute.

Defendants deny that said statute or statutes require payment of a license fee not only as to the interstate carrier for the privilege of engaging in interstate commerce but

in a separate license fee for each place of business or agency that such interstate carrier may maintain within such state.

Defendants deny that said statute or statutes required the filing of a bond by an interstate carrier among the conditions of which are not only the payment of taxes, penalties and interest imposed by said statute, but also the payment of fines in criminal cases not yet instituted and state the fact to be that the condition of the bond required to be filed is only the payment of the taxes lawfully due the State of New Mexico under and by terms of the said statute.

Defendants deny the allegation that in requiring the bond for the payment of fines imposed by said statute, the statute directly connects the penal sections of said statute and the compliance therewith by interstate carriers with the condition of the civil sections of said statute that impose obligations precedent upon the interstate carrier in his exercise of his rights to engage in interstate commerce.

Defendants deny the allegation that said statute or statutes impose upon the interstate carrier requirement of [fol. 36] filing of monthly reports of gasoline used by the interstate carrier as a facility in its interstate commerce and the paying of an excise tax thereon regardless of the place of purchase, storage or withdrawal or situs of such gasoline within or without said state, or its use or transportation by such interstate carrier in interstate commerce, and defendants state the facts to be in connection with said allegation that the said statutes in question do not require monthly reports from any users of gasoline within the State of New Mexico when the gasoline so used has been purchased within the state and the tax imposed by the said statute paid thereon but only requires a report of the use of said gasoline where no tax has heretofore been paid thereon to the State of New Mexico.

Defendants deny the allegation that said statute or statutes require a carrier engaged solely in interstate commerce to make monthly reports to said state concerning the use of its interstate facilities, not for police or regulatory requirements, but solely for the purpose of assessment and collection of excise taxes on the privilege of engaging in interstate commerce and using the facilities thereof.

Defendants deny the allegation that said statute or statutes provide diverse and severe penalties and interest for the non-payment of said unlawful excise taxes by said inter-

state carriers and state the fact to be that the taxes levied by said statutes are lawful and the penalties and interest provided upon the non-payment of said lawful taxes are reasonable and just.

Defendants deny the allegation that said statute or statutes impose upon such interstate carrier the further requirement to pay large sums of money as attorneys fees in addition to said taxes, interest and penalties, if said state shall employ attorneys to collect said tax, and state the fact to be that the provisions of said statute provide for the [fol. 37] collection of ten per cent (10%) additional as attorneys fees where suit is instituted to collect the said delinquent taxes.

Defendants deny the allegation that said statute vests complete jurisdiction in the State Comptroller of the State of New Mexico to authorize or withdraw authorization to use gasoline as an instrumentality of interstate commerce within the State of New Mexico.

Defendants deny the allegation that said statute allows said State Comptroller to make arbitrary assessments of such excise taxes as the user of gasoline if a facility in interstate commerce shall fail to make a report of the amount so used.

Defendants admit that the provisions of said statute make the amount of taxes due thereunder a lien in favor of the State upon all property within the State of all persons subject to the said tax when and if the said tax is not paid in accordance with the provisions thereof, but deny that the said provision as to the lien for the non-payment of tax applies solely to interstate carriers.

Defendants deny the allegation that said statute authorizes, without any process of law whatever, the State Comptroller to issue a warrant directed to a county sheriff to levy upon and sell the property of such user of gasoline in interstate commerce without exemption in payment of such excise taxes, interest, penalties and by said statute such warrant is so issued without any judicial procedure whatsoever is given the effect of an execution issued out of the District Court in the State of New Mexico.

Defendants deny the allegation that said statute further imposes such lien for excise taxes, interest and penalties upon the property of the successor in interest of the user of such gasoline as a facility of interstate commerce.

Defendants deny the allegation that said statutes requires such user of gasoline as a facility in interstate commerce to [fol. 38] maintain for two years records of gasoline used as well as other records that may be required by the State Comptroller, not for purpose of police regulation but solely for the purpose of facilitating the administration of said unlawful license and privilege taxes on the use of facilities in interstate commerce.

Defendants deny the allegation that said statute requires the user of gasoline as a facility in interstate commerce to purchase gasoline outside of the State of New Mexico, to carry a manifest specified by the said State Comptroller relating to the gasoline so used with various conditions and requirements concerning such manifest.

Defendants deny the allegation that said statute provides severe fines and imprisonment for violation thereof in any particular, including those particulars hereinbefore mentioned, especially providing that each day or part thereof during which any person or corporation, including an interstate carrier using gasoline as a facility in interstate commerce, defined as a "distributor", shall engage in business as such "distributor" without holding an uncancelled "distributor" license shall constitute a separate offense.

15. Answering the allegations contained in Paragraph XV of the Bill of Complaint, defendants deny that plaintiff is definitely deprived of its constitutional right to engage in intrastate commerce without submitting to unlawful rules, regulations and licenses and tax requirements of the State of New Mexico and deny that the statutes involved herein constitute any undue burden on interstate commerce.

16. Answering the allegations contained in Paragraph XVI of the Bill of Complaint, defendants deny that plaintiff will be deprived of its constitutional rights in any manner whatsoever by reason of the provisions of the statutes hereinbefore referred to.

[fol. 39] Defendants further deny the allegation that unless the Injunction prayed for in the Bill of Complaint is issued it will be deprived of its right to engage in interstate commerce without the same being unduly burdened by the action of the State of New Mexico and the defendants as officers thereof as guaranteed by Article I, Section 8, Clause 3 of the Constitution of the United States.

Defendants deny that plaintiff will be deprived of its liberty and property without due process of law as guaranteed by Amendment 5 to the Constitution of the United States.

Defendants deny that plaintiff will be subjected to the imposition of excessive fines, to cruel and unusual punishment and not required to furnish excessive bail as guaranteed by Amendment 8 of the Constitution of the United States.

Defendants deny that plaintiff will be deprived of the right to be free from the imposition or enforcement by the State of New Mexico or by the defendants as officers thereof of any law of said State of New Mexico abridging the privilege and immunities of citizens of the United States or of the plaintiff, or depriving said plaintiff or its employees of the liberty or property without due process of law, or denying to plaintiff the equal protection of the laws as guaranteed by Amendment 14 of the Constitution of the United States.

By way of further answer to the allegations set forth in the Bill of Complaint filed herein, defendants state:

(a) That the tax levied and imposed by Chapter 29 of the Session Laws of 1929 and by Chapter 176 of the Session Laws of 1933 is a non-discriminatory tax and is lawful in all respects as it affects the plaintiff herein; that Chapter 31 of the Laws of 1931 provides that the excise tax paid on gasoline in the State of New Mexico shall be refunded to [fol. 40] the person paying the same upon proper application as set forth therein in all cases where the gasoline has not been used upon the highways of the State of New Mexico; that the tax imposed by Chapter 29 of the Laws of 1929 and by Chapter 176 of the Laws of 1933 when taken into consideration with the provisions of said Chapter 31 of the Laws of 1931 is a tax upon the use of the public highways of the State of New Mexico measured by the number of gallons of gasoline used therein; that the proceeds of all of the said tax is distributed and disposed of by the terms of Section 60-205 of the New Mexico Statutes Annotated, 1929 Compilation, which said statute provides that the proceeds of said tax, except such portion thereof as may be necessary to pay the principle and interest of debentures issued hereunder, shall be paid into the State Treasury, covered into state road fund to be used for maintenance, construction and improvement of state highways and to meet the provi-

sions of the Federal Air road law; that such tax, if considered in the nature of a tax for the use of the state highways of the State of New Mexico, is a valid one even when imposed upon common carriers engaged solely in interstate commerce; that said tax is commensurate with and a fair charge for the use of the state highways by each person using them and is not discriminatory in any was upon persons engaged in interstate commerce.

(b) That even if the said tax imposed by Chapter 29 of the Laws of 1929 and by Chapter 176 of the Laws of 1933 is considered a tax upon the use of gasoline rather than upon the use of the public highways, still when said tax is considered in connection with Chapter 31 of the Laws of 1931 and with Section 60-205, New Mexico Statutes Annotated, 1929 Compilation, it is a tax which devolves only the use of gasoline upon publicly owned and maintained facilities, to-wit, the public highways of the State of New Mexico, and is valid as to an interstate carrier who obtains the bene- [fol. 41] fit of the use of such public highways.

(c) That the provisions of Chapter 176, Laws of 1933, requiring the filing of bonds and the obtaining of a license to persons subject to the payment of the said tax are nondiscriminatory and are only procedual matters to facilitate and insure the collection by the state of the taxes due it under the provisions of said law and all of such provisions are valid as to the plaintiff herein if the tax itself is sustained and found to be valid also.

Having thus made a full answer to all the matters and things contained in the Bill of Complaint, defendants pray that the Bill of Complaint be dismissed and for judgment for their costs in this behalf incurred.

Dated this 7th day of June, 1935.

Frank H. Patton, Attorney General, by J. R. Modrall, Assistant Attorney General, Attorneys for Defendants, John D. Bingaman, as Commissioner of Revenue of the State of New Mexico; Juan N. Vigil, as State Comptroller of the State of New Mexico; Frank H. Patton, as Attorney General of the State of New Mexico; Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley, as Governor of the State of New Mexico.

Duly sworn to by Frank H. Patton. Jurat omitted in printing.

[fol. 42] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO FACTS—Filed July 1, 1935

It is hereby stipulated between the attorneys for the plaintiff and the Attorney General of the State of New Mexico, representing the above entitled defendants, that, for the purposes of hearing and trial of the above entitled cause the following may be taken and considered by the Court as true:

I

That the plaintiff is a corporation under the laws of the State of Delaware and having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, and is a foreign corporation to the State of New Mexico.

II

That the defendants are all citizens and residents of the State of New Mexico and John D. Bingaman is the Commissioner of Revenue of the State of New Mexico; Juan N. Vigil is State Comptroller of the State of New Mexico; Frank H. Patton is Attorney General of the State of New Mexico; and Juanita Hill is State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley is Governor of the State of New Mexico, and are sued in their respective official capacities as named.

[fol. 43] III

That the Court sitting as a court of equity, has jurisdiction of the parties and of the subject matter hereof.

IV

That during all of the times mentioned in the bill of complaint the plaintiff and its predecessors in interest were and plaintiff still is engaged in the operation of motor busses as a common carrier of passengers between the City of Los Angeles in the State of California and the City of El Paso, Texas, over the public highways of said states and the states of Arizona and New Mexico, and that neither the plaintiff nor its predecessors in interest have at any time engaged in any intrastate business or service in the State of New Mexico.

V

That in its operations so conducted as aforesaid the plaintiff uses motor fuel, to-wit; gasoline for the propulsion of its busses, all of which gasoline concerned in this suit was purchased by the plaintiff at points outside of the State of New Mexico and at such points placed in the fuel tanks constituting regular equipment for said busses, and from said tanks used directly in the operation and propulsion of said motor busses over and across the public highways of the State of New Mexico; that none of the gasoline involved in this cause was stored or withdrawn from storage within the State of New Mexico except as the same was directly withdrawn from said standard equipment fuel tanks to the carburetors of said motor busses.

VI

That the plaintiff corporation during the times mentioned has operated one schedule in each direction each day through the State of New Mexico and is continuing so to do, all of the said schedules being a part of the continuous trip or trips between Los Angeles, in the State of California, and El Paso, in the State of Texas, or in the opposite direction from El Paso, Texas, to the city of Los [fol. 44] Angeles in the State of California.

VII

That beginning with the month of January, 1934, and since that date the plaintiff corporation has purchased the gasoline used to propel its motor busses upon the public highways of New Mexico on its west bound trips at La Tuna in the State of Texas (La Tuna being located at the state line between Texas and New Mexico) and as to the gasoline so purchased at La Tuna, in the State of Texas, beginning with the month of January, 1934, and continuously since that date, the plaintiff has received a refund of the Texas gasoline or motor fuel tax upon such gasoline used in its busses on west bound trips.

VIII

That on the east bound trips of said busses during all the times mentioned in the bill of complaint the gasoline

subject to this suit, which has been used for the operation of such busses over the public highways of the State of New Mexico, has been purchased in states west of New Mexico on which gasoline taxes have been paid either in California or Arizona.

There has been enacted by the legislature of the State of New Mexico the following relevant statutes: Chapter 29 of the Session Laws of 1929; Chapter 176 of the Session Laws of 1933; Section 2, Chapter 20 of the Session Laws of 1927 codified in the 1929 Compilation as Section 60-205; Chapter 31 of the Session Laws of 1931 as amended by Chapter 162 of the Session Laws of 1933; Chapter 129 of the Session Laws of 1929; Chapter 154 of the Session Laws of 1933.

IX

That the defendants have demanded and still demand of the plaintiff that it take out a distributor's license and pay a tax of five cents (5¢) per gallon upon each gallon of gasoline used on the public highways of the State of New [fol. 45] Mexico in the manner and form heretofore sent out under the authority of Chapter 29 of the Laws of 1929 and Chapter 176 of the Session Laws of 1933 and are threatening to enforce the provisions thereof as against the plaintiff, reference to the written demand marked Exhibit "A" and attached to plaintiff's complaint being hereby made; that the plaintiff has refused to take out the license or pay the tax as demanded; that the amount in controversy, exclusive of interest and costs, and a detriment to the plaintiff arising through the enforcing of said gasoline tax statute, if the enforcement thereof be unconstitutional, exceeds the sum of $3,000.00; that if the plaintiff should pay the demands made upon it as set out in the complaint, it has no remedy at law for the recovery of the money so paid, should it be determined that the application of the statute to plaintiff is unconstitutional; that there is no provision of law in New Mexico which would permit the plaintiff to pay the excise tax demanded under protest and to recover the same; that immediately upon payment of the tax under the provisions of Chapter 29 of the Session Laws of 1929, or Chapter 176 of the Session Laws of 1933 and within twenty-four hours after payment the same must be covered into the Treasury of the State

of New Mexico and that the same cannot be recovered from the Treasury except by legislative appropriation.

X

That if injunctive relief is not granted to the plaintiff restraining the enforcement of the provisions of the gasoline tax statute hereinbefore in this stipulation referred to, the defendants will proceed to the enforcement of the provisions of the statute as against the plaintiff, and that the effect of the enforcement of such provisions will be to prohibit plaintiff's operation of its vehicles through the state of New Mexico, unless and until it so complies with the provisions of such statute.

[fol. 46]

XI

That, in addition to the foregoing in the consideration and determination of the questions of law involved herein, the Court may consider any and all other facts of which it may properly take judicial knowledge, and nothing herein contained shall prevent any party hereto from submitting competent evidence of other or additional pertinent or material facts not contradictory of the facts herein stipulated.

XII

That the gasoline taxes collected by the State of New Mexico under the provisions of Chapter 29 of the Laws of 1929 and under the provisions of Chapter 176 of the Laws of 1933 are distributed and used by the State of New Mexico in accordance with the provisions of Sec. 60-205 of the New Mexico Statutes Annotated, Compilation of 1929.

XIII

That by nothing herein contained does any party hereto agree that all facts herein stipulated are relevant or material, and the right to object to any fact so stipulated on the ground of irrelevancy or immateriality is hereby reserved.

XIV

That on the facts the Court shall render such judgment and grant such relief as shall be just and proper under the

Constitution and laws of the United States and the Constitution and Laws of the state of New Mexico.

Respectfully submitted, Earl A. Bagby, E. R. Wright, Attorneys for Plaintiff. Frank H. Patton, Attorney General; Quincy D. Adams, J. R. Modrall, Assistant Attorneys General, Attorneys for Defendants.

[fol. 47] IN UNITED STATES DISTRICT COURT

Before McDermott and Bratton, Circuit Judges, and Nebiett, District Judge

OPINION—Filed July 19, 1935

Per CURIAM:

By Section 2, Chapter 176, Laws of 1933, the New Mexico legislature "levied and imposed an excise tax of five cents (5¢) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this state for any purpose except gasoline sold in interstate commerce, * * *"

Plaintiff operates a bus line through New Mexico, doing no intrastate business. It buys no gasoline in the State,[1] Transcontinental Air Co. v. Lujan, 8 Pac. (2d) 103, nor does it store gasoline in the state, American Airways, Inc. v. Wallace, 57 F. (2d) 877, affd. 287 U. S. 565; Nashville C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249; American Airways, Inc. v. Grosjean, 3 F. Supp. 995, affd. 290 U. S. 596; Edelman v. Boeing Air Transport, Inc., 289 U. S. 249. The only use in the state to which plaintiff puts its gasoline is in propelling its busses, the gasoline being carried in tanks on the busses connected directly with the carburetors. As an excise tax on the privilege of use, the facts bring it squarely within the much distinguished but still unreversed doctrine of Helson and Randolph v. Kentucky, 279 U. S. 245.

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[1] We take note of the fact that occasionally gasoline was bought in the state and the tax paid thereon without contest. This case, save for the administrative provisions noticed later, is concerned only with gasoline used from tanks on the busses for propulsion.

However, unlike the ferry boats in the Helson case and the airplanes and railroad motors in the other cited cases, plaintiff does use the state owned highways, and the state has ample power to exact a reasonable charge for that use even of purely interstate carriers. The right to carry on interstate commerce gives plaintiff no right to use state highways or park in the state house grounds as a garage, [fol. 48] without paying a fair charge therefor. Clark v. Poor, 274 U. S. 554; Carley & Hamilton, Inc. v. Snook, 281 U. S. 66; Interstate Busses Corp. v. Blodgett, 276 U. S. 245; Continental Baking Co. v. Woodring, 286 U. S. 352. It is neither charged nor proven here that five cents a gallon is, together with the modest mileage charge laid by another statute, such an exorbitant charge as to be a tax disguised as compensation, nor that the method has no reasonable relation to the use made of the highways. We know that the heavier and faster the bus, the more damage it does to the highways, and in rough approximation, the more gasoline it uses. If the legislature, by this statute, exacted compensation for the use of the highways, plaintiff must fail.

But unless the statute can fairly be construed as a charge for the use of state facilitation, rather than an excise tax on the privilege of interstate commerce, then plaintiff must prevail. Interstate Transit, Inc. v. Lindsey, 283 U. S. 183. Free to construe this statute a prioi, the fact that the proceeds of the sales tax, and perhaps of the use tax, go exclusively to highway financing, would be most persuasive. Interstate Transit, Inc. v. Lindsey, supra. That a mileage tax is also imposed is not controlling. Interstate Busses Corp. v. Blodgett, supra. Practical considerations support such a construction, for these menacing mammoths of the highway ought to pay for the damage they do.

But we are not free. The New Mexico statute means what the New Mexico Supreme Court says it means. The predecessor of this statute, in language so nearly identical as to admit of no distinction, has been twice before the Supreme Court of New Mexico. In Breece Lumber Co. v. Mirabal, 287 Pac. 699, plaintiff was compelled to pay the tax on gasoline used in logging operations, none of which was used on the highways. The court specifically held it was a tax, as the statute says, and not compensation for the use [fol. 49] of the highways. Later, an airplane company, not using the highways, was compelled to pay the sales tax, but

not the use tax. Transcontinental Air Co. v. Lujan, supra. In 1931 the legislature exempted gasoline bought in large quantities and not used on the highways. This amendment was called to the attention of the Supreme Court on rehearing, in the last case, the claim being that the amendment disclosed a legislative intent to construe the statute as designed only for compensation for the use of the highways. But the Supreme Court said that the history of the statute warranted no such construction, adhered to its view that a tax was imposed and not compensation exacted, and the airplane company was required to pay the tax.

A decent respect for these opinions of the highest court of New Mexico seems to repel the conclusion that this statute exacts a charge for the use of highways but does not impose a tax. If it is a compensation statute, the airplane company should not have paid. It cannot be a tax for airplanes and a charge for busses. It is one or the other. True, it was the sales tax there involved, and not the use tax. But where the statute imposes "an excise tax upon sale and use," it is hair-splitting to say that "excise tax" means what it says with reference to "sale" and an entirely different thing with reference to "use" in the same breath.

Until the New Mexico statute is amended or the Supreme Court of New Mexico otherwise interprets it, the majority of the court defer to the decisions as they now exist. The presumption of constitutionality hardly justifies a federal court in refusing to follow state decisions construing state statutes.

That Texas rebates plaintiff taxes paid on gas purchased in Texas and used in New Mexico is a circumstance that bears on the rough justice of the situation, but does not [fol. 50] bear on the critical question of what the New Mexico legislature intended when it enacted this statute some years before the rebate was granted by another sovereignty.

We adopt the stipulated facts as our findings; a decree enjoining the collection of the tax will be prepared and entered. Administrative provisions of the statute, incidentally attacked, seem appropriate to the enforcement of the statute. They do not require plaintiff to do business in New Mexico. The decree will not enjoin administrative provisions appropriate to enforce the mileage tax statute, or the sales tax on such gasoline as plaintiff does buy in the state.

If defendant appeals within thirty days of the entry of the decree, a stay will be granted to the end that the bond now in force shall remain in force pending the appeal, to protect the defendant in event the decree is reversed.

We are indebted to counsel for their intelligent cooperation in agreeing upon the facts and in expediting a decision, and for very helpful argument and briefs.

Done at Santa Fe, New Mexico, this the 19th day of July, A. D. 1935.

Geo. T. McDermott, United States Circuit Judge.
Colin Neblett, United States District Judge.

IN UNITED STATES DISTRICT COURT

DISSENTING OPINION

BRATTON, Circuit Judge, dissenting:

The crucial question presented for determination is whether the tax involved represents a reasonable and nondiscriminatory excise upon the privilege of using the public [fol. 51] highways of New Mexico in the conduct of an interstate motorbus business or a levy upon the prerogative to engage in interstate commerce. If the former it is valid; if the latter it violates the commerce clause of the Constitution of the United States and must fall.

A sketchy chronology of the legislation in New Mexico may be helpful. Chapter 93, Laws of 1919, imposed a tax of two cents per gallon on all gasoline sold or used within the state and expressly provided that the proceeds derived therefrom, after payment of certain salaries and expenses, should be covered into the road fund to be used for the construction, improvement and maintenance of the public highways. Chapter 175, Laws of 1921, levied a tax upon gasoline sold but did not cover gasoline used and it repealed the earlier act in toto. That act was amended by Chapter 61, Laws of 1925, but it likewise did not include a tax on gasoline used. Chapter 20, Laws of 1927, being Secs. 60-203-205 Comp. 1929, dealt exclusively with sales and did not concern itself with use. Chapter 14 of the same session, laid a tax of five cents per gallon on gasoline used for the propulsion or operation of motor-busses, commercial cars, trucks or other vehicles upon the highways. It was amended by

Chapter 29, Laws of 1929, being Sec. 60-101 Comp. 1929, to extend the tax to gasoline used for any purpose. The amending act reads:

"There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state *for any purpose;* provided that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of the gasoline so used."

[fol. 52] Chapter 31, Laws of 1931, authorized a refund of the tax collected upon gasoline purchased in specified quantities and used exclusively for other purposes than the operation of motor vehicles upon the public streets or highways of the state. That act was amended in certain particulars by Chapter 162, Laws of 1933, but the amendment has no significance here. It still authorizes a refund upon one hundred or more gallons of gasoline if acquired by single purchases of fifty gallons or more and is used otherwise than in the operation of vehicles on the streets or highways. That act was approved March 15, 1933. Then followed Chapter 176, Laws of 1933, approved the succeeding day. It defines a distributor, among other things, as being any person using or consuming gasoline within the state before it shall have been received by any other person there. Section 2 levies and imposes an excise tax of five cents per gallon upon the sale or use of gasoline sold or used within the state, except that sold in interstate commerce. Section 3 makes it unlawful for any distributor to use any motor fuel without procuring a license from the Comptroller. It further provides for the payment of a license fee of $25.00. Upon compliance with that section a license is issued which entitled the licensee to transact business in the state. Section 4 provides for the filing of a bond conditioned upon payment of any tax which may fall due and the making and filing of certain required reports, the amount of the bond to be double the estimated amount of the tax due for one month. Section 13 provides that the tax shall be distributed as then or thereafter provided by law.

No argument is presented with respect to the application of the funds derived from the tax on the sale and that on the use of gasoline. All parties assume that the funds derived from both sources are applied, first, to the discharge

of outstanding highway debentures and then to the construction, operation and maintenance of public highways. [fol. 53] The law has been uniformly administered in that manner and it, therefore, is unnecessary to turn aside for the purpose of considering whether there is any distinction between the uses to which the two classes of revenue may be devoted.

Plaintiff asserts that the exaction of the tax in question casts an undue burden upon interstate commerce. Its chief reliance to sustain that contention is placed upon Helson v. Kentucky, 279 U. S. 245. There the State of Kentucky attempted to impose a tax upon gasoline used in the operation of a ferry on the Ohio River. The ferry was engaged solely in the transportation of passengers between the States of Illinois and Kentucky. All of the gasoline was purchased in Illinois; seventy-five per cent of it was consumed in Kentucky and the tax was asserted only on that part of it. The court held that the tax was a direct burden on interstate commerce and therefore invalid. But that case is clearly distinguishable from this one. There no state facility was used in the operation of the business. Here, plaintiff uses and enjoys the public highways in the conduct of its business. They are constructed and maintained at great public expense. That heavy busses operated at high speed wear and tear highways thus increasing the expense of upkeep and repair is a recognized fact. It is now settled by repeated adjudications that a common carrier for hire, who uses the public highways in the conduct of its business may be required to contribute to their cost and upkeep, although it is engaged exclusively in interstate commerce. If reasonable and non-discriminatory, that contribution in the nature of compensation may be fixed upon the basis of an annual tax graduated according to the number and capacity of vehicles used, Clark v. Poor, 274 U. S. 554; it may be fixed by mileage, Interstate Busses Corp. v. Blodgett, 276 U. S. 245; it may be upon a per gross ton mileage, Continental Baking Co. v. Woodring, 286 U. S. 352, or [fol. 54] upon any other basis which sustains a direct relation to the wear and tear of the highways.

A careful analysis of the legislation in New Mexico indicates clearly that the tax now required, measured by the amount of gasoline used in the operation of motor vehicles upon the public highways, is in essence an excise in the na-

ture of compensation for the privilege of using the highways. The earlier act laid the tax upon gasoline used for any purpose. It was not confined to that consumed upon the highways and its validity was sustained. Breece Lbr. Co. v. Mirabal, 34 N. M. 643, 287 Pac. 699. But the legislature in 1931, that is at the next session following that decision, authorized refunds upon gasoline not used upon the highways. That chronology argues convincingly that the legislature intended to meet the decision of the court and correct an undesired situation by converting the tax into one of compensation for the privilege of using the highways. When considered in connection with the fact that the proceeds, above the amount required for administration, were allocated to highway purposes, it amounted to a legislative declaration to that effect. The objective could have been reached in either of two methods: enact a completely new statute levying the tax only upon gasoline used in vehicles on the highways, or allow the existing law making the levy general to remain in force and enact a special statute authorizing refunds. The former method would have entailed manifest administrative difficulties with much evasion of taxes. The latter presented plain advantages in its administration with less escape of taxes. That method was employed and it evinces a clear intent and purpose on the part of the legislature to require compensation for the privilege of using the highways—not the privilege of engaging in business. The fact that all of the revenue derived, except that required for administration, is allocated to highway [fol. 55] purposes lends strong support to that conclusion. Clark v. Poor, supra; Interstate Transit, Inc. v. Lindsey, 283 U. S. 183; State v. Johnson, — La. —, 138 So. 503.

Since the compensation thus required is measured by the quantity of gasoline consumed, it bears a direct and pertinent relation to the wear and tear of the highways and the method of computing it is not arbitrary. On the contrary, it is reasonable and free from discrimination in method and amount.

Neither Breece Lbr. Co. v. Mirabel, supra, nor Transcontinental & Western Air, Inc. v. Lujan, 36 N. M. 64, 8 Pac. (2d) 103, announces a doctrine contrary to anything which has been said. The former merely held that Chapter 29, Laws of 1929, imposed a tax upon all gasoline used within the state and consequently applied to that consumed in the

cutting, logging and processing of timber. Manifestly, that was correct. The statute under consideration levied the tax upon all gasoline used without exception, exclusion or limitation and its validity was sustained as an excise. That is the scope of that decision. The court held in the latter case that the tax upon gasoline purchased outside the state, but consumed within its boundaries in the operation of airplanes engaged in interstate commerce, could not be sustained because it constituted an excise upon the use of an instrumentality of interstate commerce. But there the planes did not use the highways. No use of a state facility was involved. The tax was wholly foreign to the cost and upkeep of the highways. It could find no other basis than impingement upon the use of an instrumentality in interstate commerce. The act of 1931 authorizing refunds was called to the attention of the court on rehearing in that case. But the tax involved there had accrued before that statute became effective. That fact is plain from the statement in [fol. 56] the opinion making disposition of the motion that the statute went into effect after the suit was filed. The contention advanced was that by the refunding statute, the legislature of 1931 attempted to construe the act of 1929 in such manner that its provisions did not apply to gasoline sold for use in interstate aircraft. The court responded with the statement that the history of gasoline tax legislation did not warrant that construction. The accuracy of that statement is evident. The legislature in 1927 passed an act levying the tax only upon gasoline used for operating vehicles on the highways. That act was amended at the next session to extend its application to all gasoline used in any manner. The amended statute quoted above was in force at the time the tax involved in the suit accrued. Manifestly, the act passed in 1931 providing for refunds could not reflect a legislative intent in 1929 to apply the tax only to gasoline used on the highways when the statute of 1929 itself expressly provided otherwise by amending a prior act to extend the tax to gasoline used for all purposes. That was the sole purpose of that amendment. The substance of the argument was that the legislature of 1929 intended one thing when it provided the opposite in clear and unmistakable language. Rejection of the contention occasions no surprise. But here we deal with the situation after 1931. That the legislature did not intend for the act of 1931 to

serve retroactively by exempting gasoline theretofore used otherwise than on the highways is beside the question. The pertinent inquiry is what prospective change did the act of 1931 effect. The language contained in the opinion on rehearing in that case has no bearing upon the problem with which we are confronted. Moreover, the statute of 1931 did not attempt to exempt any gasoline used from the payment of the tax at the time of its purchase. It merely authorized refunds in certain circumstances. That presupposes payment of the tax, rather than its exemption as [fol. 57] there contended by the taxpayer.

Of course, this court maintains a becoming respect for the decisions of the Supreme Court of the state. Its construction of the constitution and statutes of the state are binding upon this court. But that court has never held that the tax now authorized, measured by the quantity of gasoline consumed in the operation of motor vehicles on the highways, is an excise upon the privilege of engaging in business. When it has construed the statute in that manner, we should hold that the state is powerless to exact the tax from a company engaged exclusively in interstate commerce because it would violate the commerce clause of the Federal Constitution, but until then plaintiff should be required to pay it as reasonable and non-discriminatory compensation for the privilege of using the public highways of the state. For these reasons I dissent.

Sam G. Bratton, Circuit Judge.

[fol. 58] IN UNITED STATES DISTRICT COURT

DECREE OF INJUNCTION—Filed August 9, 1935

This cause came on for final hearing on the bill of complaint herein praying for a decree enjoining and restraining the defendants from enforcing or attempting to enforce the provisions of Chapter 176 of the Session Laws of 1933 of the State of New Mexico as against the plaintiff, insofar as the same relates to gasoline or other motor fuel purchased by plaintiff within other states than the State of New Mexico and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate com-

merce in, into and across the State of New Mexico; and the Judge of the above court having called to his assistance to hear and determine this cause, the Hon. George T. McDermott and the Hon. Sam G. Bratton, Judges of the Circuit Court of Appeals for the Tenth Circuit pursuant to Section 266 of the Judicial Code; and

The defendants having filed their answer and the parties hereto having stipulated the facts; and

Said cause having come on to be heard before said three Judges and the plaintiff appearing by Earl A. Bagby of Los Angeles, California, and E. R. Wright of Santa Fe, New Mexico, attorneys and solicitors for the plaintiff, and the defendants appearing by Frank H. Patton, Attorney General of the State of New Mexico, and J. R. Modrall and Quincy D. Adams, Assistant Attorneys General of the State of New Mexico, and the case having been fully argued and submitted,

It is ordered, adjudged and decreed by said Three-Judge Court that:

1. The threatened application by defendants as officers of the State of New Mexico of Chapter 176 of the Session Laws of 1933 of the State of New Mexico, to the plaintiff [fol. 59] herein so far as relates to gasoline or other motor fuel purchased by plaintiff within other states than the state of New Mexico, and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico is contrary to and prohibited by Art. 1, Sec. 8, Cl. 3 of the Constitution of the United States and is void and unenforceable against the plaintiff; to all of which the defendants except.

2. That a permanent injunction issue, enjoining and restraining the defendants John D. Bingaman, as Commissioner of Revenue of the State of New Mexico, Juan N. Vigil, as State Comptroller of the State of New Mexico, Frank H. Patton, as Attorney General of the State of New Mexico, Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley, as Governor of the State of New Mexico, and each of them, their successors, agents, servants, employees and attorneys, and those in active concert or participating with them, from arresting or causing or authorizing the arrest of plaintiff, or its agents or em-

ployees, or otherwise preventing or interfering with plaintiff in its conduct of its operation of busses as a common carrier of passengers and property for compensation over the public highways of the State of New Mexico in interstate commerce, because of any alleged noncompliance with Chapter 176 of the Session Laws of 1933 of the State of New Mexico so far as relates to gasoline or other motor fuel purchased by plaintiff, within other states than the State of New Mexico, and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico; and from enforcing said statute in any other manner against this plaintiff or its predecessors in interest by reason of the [fol. 60] use of gasoline or other motor fuel within the State of New Mexico that shall have been or shall be acquired, or purchased and placed in vehicles outside of the State of New Mexico, and used as aforesaid. To all of which defendants except.

Done at Santa Fe, New Mexico, this the 2nd day of August, A. D. 1935.

Geo. T. McDermott, United States Circuit Judge.
Colin Neblett, United States District Judge.

Approved as to form: E. R. Wright, Solicitor for Plaintiff. J. R. Modrall, Asst. Attorney General.

[fol. 61] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed August 20, 1935

Comes now John D. Bingaman as Commissioner of Revenue of the State of New Mexico, Juan N. Vigil as State Comptroller of the State of New Mexico, Frank H. Patton as Attorney General of the State of New Mexico, Juanita Hill as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley as Governor of the State of New Mexico, being all the defendants in the above entitled cause by and through their attorneys, Frank H. Patton, Attorney General of the State of New Mexico, and J. R. Modrall and Quincy D. Adams, Assistant Attorneys General of the State

of New Mexico, and conceiving themselves aggrieved by the decree entered in said cause on the 9th day of August, 1935, perpetually enjoining the said defendants and their agents, employees and servants from enforcing or attempting to enforce the provisions of Chapter 176 of the Session Laws of 1933 of the State of New Mexico against the above named plaintiff so far as relates to gasoline or other motor fuel purchased by plaintiff within other states than the State of New Mexico and placed in vehicles of the plaintiff in other states than the State of New Mexico and used in said vehicles for the propelling of same in interstate commerce within the State of New Mexico, pray an appeal may be allowed from said decree to the Supreme Court of the United States and in connection with this petition the said defendants herewith present their Assignment of Errors and Statement of Jurisdiction.

Dated this 15th day of August, A. D., 1935.

[fol. 62] Frank H. Patton, Attorney General; J. R. Modrall, Assist. Attorney General; Quincy D. Adams, Assist. Attorney General, Attorneys for Defendants.

The above appeal allowed this 15th day of August, A. D., 1935.

Colin Neblett, United States District Judge. Geo. T. McDermott, United States Circuit Judge. Sam G. Bratton, United States Circuit Judge.

Service of a copy of Petition for allowance of appeal acknowledged this 15th of August, 1935.

E. R. Wright, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed August 20, 1935

Comes now John D. Bingaman, as Commissioner of Revenue of the State of New Mexico; Juan N. Vigil, as State Comptroller of the State of New Mexico; Frank H. Patton, as Attorney General of the State of New Mexico; Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley, as Governor of the State of

New Mexico, defendants below, appellants here in the above entitled cause, by and through their attorneys, Frank H. Patton, Attorney General of the State of New Mexico, and J. R. Modrall and Quincy D. Adams, Assistant Attorneys [fols. 63–75] General of the State of New Mexico, and in connection with their appeal make the following assignment of errors.

I

The Court erred in entering its decree of August 9, 1935, perpetually enjoining said defendants from enforcing or attempting to enforce the provisions of Chapter 176 of the Session Laws of 1933 of the State of New Mexico against the plaintiff insofar as the provisions of said law relate to gasoline or other motor fuel purchased by plaintiff within other states than the state of New Mexico and placed or to be placed in its vehicles in other states than the State of New Mexico and used in said vehicles for the propelling of the same in interstate commerce in, into and across the State of New Mexico.

Dated this 15th day of August, 1935.

Frank H. Patton, Attorney General; J. R. Modrall, Assistant Attorney General; Quincy D. Adams, Assistant Attorney General, Attorneys for Appellants.

Service of a copy of above assignments of error acknowledged this 15th day of August, 1935.

E. R. Wright, Attorney for Plaintiff.

[fol. 76] In United States District Court

Waiver of Citation

The issuance and service of the citation to appear in the Supreme Court of the United States in the above entitled case is hereby waived, and receipt of a copy of the præcipe for the record is hereby acknowledged this 15 day of Aug. 1935.

E. R. Wright, Attorney for Plaintiff.

[fol. 77] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] IN SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS RELIED ON AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed Oct. 19, 1935

Based upon the Assignment of Errors heretofore filed in the above entitled cause, the appellants hereby state that they intend to rely on the following points, namely:

I

The threatened application of Chapter 176 of the Session Laws of 1933 of the State of New Mexico to the appellee, [fol. 79] so far as the same relates to gasoline or other motor fuel purchased by appellee outside of New Mexico and used in appellee's vehicles in New Mexico to propel the same in interstate commerce, is not contrary to nor prohibited by Article 1, Section 8, Clause 3 of the Constitution of the United States, because:

(a) When considered in conjunction with Chapter 31, Session Laws of New Mexico for 1931, said Chapter 176 constitutes merely a compensatory and regulatory exaction for the use of the public highways of the State of New Mexico.

(b) Even if said Chapter 176 should be construed as applied to appellee as an excise tax upon the use of gasoline in interstate commerce, it is justifiable as a compensatory and regulatory exaction for the use of state facilities.

(c) The Supreme Court of New Mexico has not construed said Chapter 176, Laws of 1933, in conjunction with Chapter 31, Laws of 1931, so that its application to appellee will be a violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, and

(d) The characterization of Chapter 176, Laws of 1933, by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States where the question

involved is one of deprivation of rights secured by the Federal Constitution.

II

The appellants hereby designate the following portions of the record which they think necessary for the considera-
[fol. 80] tion of the points above stated:

(1) Bill of Complaint.
(2) Answer of Defendants.
(3) Stipulation of Facts.
(4) Decree of Injunction.
(5) Majority Opinion of the Court.
(6) Dissenting Opinion of Circuit Judge Sam G. Bratton.
(7) Petition for Appeal and Order Allowing Same.
(8) Assignment of Errors.
(9) Waiver of Citation.
(10) Appellants' Statement of Jurisdiction.
(11) Aoknowledgment of Service of Jurisdiction.
(12) Statement of Appellee in Opposition to Jurisdiction.
(13) Motion to Affirm.

Items Nos. 10, 11, 12 and 13 are hereby designated for printing in accordance with Paragraph 5 of Rule 12 of the Rules of the Supreme Court of the United States.

Frank H. Patton, Attorney General of the State of New Mexico, Santa Fe, New Mexico, Attorney for Appellants.

Service acknowledged this 15th day of October, 1935.

E. R. Wright, by Donovan N. Hoover, Counsel for Appellee, Santa Fe, New Mexico.

[fol. 81] [File endorsement omitted.]

Endorsed on cover: File No. 40,074. New Mexico D. C. U. S. Term No. 520. John D. Bingaman, as Commissioner of Revenue of the State of New Mexico, et al, appellants, vs. Golden Eagle Western Lines, Inc. Filed October 16, 1935. Term No. 520, O. T., 1935.